NOTES FOR ADDRESS BY

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TO

INTERNATIONAL LAW ASSOCIATION

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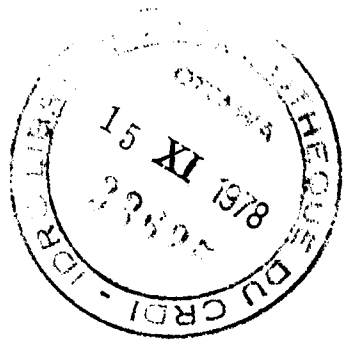

In those happy days when I was teaching law - and they were happiest in the hours occupied with international law - I often referred students to the description of the role of law once written by Paul Freund: "History itself is a tension between heritage and heresy, which law in its groping way seeks to mediate." Seldom, it has always seemed to me, has there been a more apt, or a more cogent, description. And to one whose adult life has largely been preoccupied with issues of international dimensions, this reminder of the vital yet necessarily limited role of law has always been refreshing.

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I was never certain in those university days, and even less on some occasions subsequently, whether the greatest danger to society (and, in particular, Canadian society) lay in a failure to recall heritage or in an unwillingness to contemplate heresy. We need not read Dickens to realize that there has never been any shortage of lawyers and members of other disciplines who display precious little awareness that they are travelling upon a bridge of finite length, not on an endless treadmill that somehow guarantees a regular repetition of familiar events. So long as history is a tension, then are our acts contributions to it.

But my criticism is perhaps too harsh. Men and women tend to think of issues more often than they speak of them. That fact has proved to be the downfall of many a believer in public opinion polls. It leads, too, on occasion to over-reliance on presumed silent majorities. Nevertheless, it has contributed, and unfortunately, to the unhealthy memory of long-distant events which may then become subject to exploitation by willing revivalists. One of the significant contributing factors to the outbreak of World War I, for example, was the smouldering but ever lingering recollection by the French of the humiliation suffered by them

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in the loss of Alsace-Lorrain following the conclusion of the Franco-Prussian War. "N'en parlez jamais; pensez-y toujours" counselled Léon Gambetta of the armistice terms imposed at Sedan.

Today, passing in the streets outside this building are automobiles upon whose license plates bear both the recollection of heritage and the unspoken promise of heresy: "Je me souviens."

At one time, in the long ago before public opinion polls or automobile licenses and bumper stickers, soothsayers and astrologers were able to prophesy with confidence forthcoming events of great moment - of heresy, if you will - by looking to the heavens for signs. Halley's comet, for example, was said to have heralded the Norman Conquest.

Today, with no confidence in celestial signs, and concern about the insidious potential of silent slogans, how may we maintain the equilibrium of attitude and action on which depends orderly process?

By conferring, as you are doing this week in Ottawa.

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By looking up on occasion; by refusing to become captives of those editorialists who counsel us every day on the basis of time measured in 24 hour segments; by attempting to maintain perspective in an age when information floods upon us and threatens to carry away with it like worthless flotsam all those who attempt to analyze it and understand it.

Ten days ago it was reported that Ramon Mercader died in Havana. He is remembered only because he was the assasin of Leon Trotsky four decades earlier in Mexico. Yet his death, like all deaths, prompts us to reflect on what incredible events have taken place in the relatively short span of time since Trotsky burst upon the world's consciousness in Petrograd in 1917. The air transport age, the atomic age and the space age have all followed quickly one on the other. Mass communication and mass consumption. Electro-cardiography, radio-telescopes, antibiotics, nylon, computers, DNA. World Wars and regional wars and local wars. The end of colonialism; the beginning of television; oral contraceptives, political terrorism. Environmental degradation, nuclear proliferation, the challenge of the third world. Some novel; some old, but refined to unprecedented proportions.

Proliferation, too, of international institutions and the birth of alphabet agencies, first in the United States, then of a multilateral kind. Acronyms have become part of our vocabulary. Perhaps now part of our heritage.

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Lawyers have long been used to this kind of shorthand. S.C.R.s, UTLJ and LRQB roll off the lips of a first year law student as readily as if he had typewriter keys implanted in his brain. International lawyers leap still further - BYIL, ICJ (and, just to confuse outsiders, IJC also). And because we work with international political bodies the range is immense - ILO, FAO, UNDP, OAS and OECD. Confusion is compounded when they cease to be initials and start to be pronounced: UNGA, UNITAR, IMCO, NATO, and WIPO.

Bolstered by my legal background, and with ten years experience of foreign activity in the Prime Minister's Office (PMO), I felt that I was as familiar as anyone in Canada with the intricacies of the acronym jungle. Hadn't I participated at CSCE? Hadn't I been part of CHOGM (an unnecessarily long acronym, designed to avoid the danger replete in the simpler HOG)? CIEC, UNCTAD, MBFR, and SLBMs were all old hat to me.

Then I moved to IDRC. Now I am under seige from all directions, and simultaneously, with such exotic terms as SEARCA (South East Regional Centre for Research in Agriculture), IFPRI (the International Food Policy Research Institute) and APLIC (the Association of Population and Family Planning Libraries and Information Centres). There's the BID and the BAD. And because

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we work in three languages at the Centre, most of these - and the others printed in the 100 page acronym dictionary prepared by the Centre - must be recognized as well in each of Spanish and French. My favorite is FEPAFEM (Federacion Panamericana de Asociaciones de Facultades de Medecina) but I find inspiration and challenge in Le Centre de recherches et d'information socio-politiques. Its acronym is, as you have calculated, CRISP.

Acronyms by themselves contribute nothing to society or to social processes, apart perhaps from a tantalizing new exercise in alphabet skills. Nor, of course, do the institutions and activities those acronyms represent necessarily make a contribution. The contribution is found in the principles for which they stand, the goals which they pursue, and the vigour of their functioning.

If we, as members of the ~~WFIL~~ ILA, are dedicated to orderly legal processes - and beyond that to world public order - how are we doing? Given lofty principles, given attractive goals, what progress are we making as we engage with vigour the tasks we assume? Are we, in the words of Harold Lasswell several years ago, agents or counter-agents of the very order we seek?

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Have we and our counterparts and our predecessors over the years thrown our weight, he asked, on the side of at least minimum public order? or away from it? Professor Lasswell answered those questions in a brilliant paper to the ASIL several years ago by suggesting that from the time of tribal societies, professionals have acted on both sides of the issue; that those he described as "client-servers" have been closely bound to the protection of established orders; that only in their guise as "citizen-participants" have individuals contributed to a potential public order based on human dignity.

It's not for me to assume what assessment a Harold Lasswell of the next century would make of us. (I'm optimistic enough to believe that he would not find himself aboard some version of Battlestar Galactica measuring not our contributions but our failures.)

Yours is a very down to earth and factual exercise this week - an examination of that important segment of world public order called human rights. It is difficult to conceive of a more important subject, or one more fraught with practical difficulty. The championing of that subject has elected a president, infuriated - we are told by the press - a chancellor, contributed to the difficulty of concluding SALT II, extended for many weeks the CSCE review

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conference at Belgrade, and bemused Henry Kissinger. The process may also have enhanced the human rights of some persons. It has undoubtedly raised immensely the hopes of many others. And in that painfully arduous activity which is the quest for civilization, hope fuels the engines of progress.

The price of that fuel can be high, however. It can interrupt some of the very activities which the human rights exercise seeks to promote. It can concentrate attention on a handful of incidents which appear at first glance to be symbolic, but which prove on examination to be mere tokens. It can create the impression that human rights are defined as those of interest to the champion, not the victim.

Human dignity is a fabric of many fibres. Any rent or tear weakens the whole. It assumes life. (And thus my concern about any impediment to the conclusion of SALT II and the early commencement of SALT III.) It assumes freedom. It assumes also, we are often reminded, health and social purpose.

Our response to those assumptions is not always consistent. When we are told by leaders of developing countries that human rights begin in the stomach, we tend to be irritated. When asked of the extent of our interest in the enhancement

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of economic activity in the third world, we often display a greater commitment to protection of our already commanding income advantage. I am not suggesting that the plight of social scientists in Chile, or dissidents in Korea, or Jews in the Soviet Union are any less demanding of our attention because of the economic plight of the billions of persons in the third world now subsisting on the threshold of squalor and starvation. What I am saying is that in our normal instinct to be selective, we not be hypocritical about our righteousness. I have never observed an absence of letters to newspaper editors and to the Canadian Government urging more vigour in chastizing this or that authoritarian state for its treatment of minorities or oppressed majorities or the politically neutered. I've yet to see, however, a single whisper of complaint in any form about the government's recent and well-publicized proposals to reduce dramatically the effectiveness of its foreign developmental assistance programs. I'm aware, too, that from some of the same constituencies in this country that have for long supported and, I hope, still support such programs, come anguished protest at the importation of goods from low-wage countries.

We are familiar with the fact in Canada that high wages and high productivity are not necessarily co-terminus. I'm doubtful that high wage levels in South East Asia would make the importation into Canada of competitively priced textiles any less

objectionable to the critics. It's perhaps not necessary for me to remind you of this particular paradox.

It's certainly not necessary for me to remind you of the broad sweep which is human rights. Professor Humphrey has never let Canadians forget that the Universal Declaration of Human Rights extends beyond political and social rights to economic rights. I'm confident his contributions to this conference will continue to emphasize that fact.

Where then, in this context, rests heresy? In seeking to protect through traditional techniques the economic advantage of the industrialized countries? Or in a willingness to move beyond rhetoric and to contribute to a world public order which incorporates as an essential constituent a new international economic order? And what is the role of the international lawyer in this process; is he in Lasswell's terms an agent or a counter-agent? Or, perhaps, is his responsibility only to moderate the inevitable and even-now-momentous movement away from heritage?

In the narrowest of foci, what has been the contribution of law to the process of development? What of the effects of a Calvo Clause, of the sometimes conflicting principles of economic and social organization and development, of double burdens, inconsistent legal demands, extraterritoriality and the plethora of issues and

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problems with which international lawyers wrestle? What, too, of the effect on development of municipal legal systems both as regards substantive laws and judicial processes? On which side of the development coin does the law generally find itself?

With your permission I should like to mention some of the practical interfaces where law and development sometimes mesh smoothly, but more often clash in disharmony and friction. In doing so, there are two separate bodies of law at work, one municipal, the other international.

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Law was the major tool used by the colonial powers to establish their presence and to create administrative, social and economic structures. The present leaders of the newly-independent states grew up under systems of law received, in many instances, from other societies, and they gained independence within the framework of such systems.

From independence onward, valiant efforts have been made in many places to modify the existing legacy of legal systems to bring them into harmony with the cultural, social and economic aspirations of the indigenous peoples in their new era of sovereignty. However, the constraints of these "grafted" legal systems are deep-rooted, comprehensive and not easily shaken. The dilemma is between continuation of the imposed legal systems and the inability of those systems to nurture newer legal regimes responsive to the current social and economic needs of free people. This situation has bred suspicion, revolt and frustration in many instances, and some reformist legislation. But the promise of independence in terms of social and economic welfare remains unfulfilled to a marked degree.

Just as the law was used to impose order on the colonization process, so must it now be used to promote reforms demanded by fundamentally changed conditions. In some countries, this trend has been slowed down or halted by the overthrow of democratically elected governments and the use of law as an instrument of control and perpetuation of power without the consent of the governed.

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It is also a reality that in many developing countries, key interpretations of the law are given within a political rather than a legal framework. The courts play an insignificant role in the development of public law or, at most, a negative role because the law is often altered to overcome inconvenient decisions. This political use of law is a legacy of colonialism which should be eliminated but will die hard. It breeds disrespect for established legal order in the minds of the people and acts as a major barrier to acceptance of the lawyers' fundamental concept of society under the rule of law.

What are the problems of developing countries that particularly distinguish them from the developed? Lack of social, political and economic institutions; lack of industrial, agricultural and communication infrastructure; lack of technology, absorptive capacity and research facilities; lack of food, shelter, schooling and social welfare.

Unemployment on massive scales, unchecked corruption and suppression of freedoms accentuate the problems. Tribal divisions, repression and ideological conflicts cause distrust of authority and refusal of civilians to cooperate in advancing development.

It is against a background of such difficulties that new nations must promote development through use of the law as an

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instrument of social engineering, of change, of reform and of accommodation of conflicting interests. And to employ it in a fashion that does not suppress the freedom of the individual, but upholds and enhances human values, human dignity, and human rights.

It is a challenge worthy of the most dedicated lawyers.

Developing country concerns and resentment about traditional international law are gradually being overcome through the involvement and participation of the developing countries in law-making treaties dealing either with completely new subjects or updating existing normative standards. By this process international law is being "universalized" in a number of areas so familiar to all of us: diplomatic and consular relations, law of the sea, outer space, exploitation of natural resources, the status and role of multinational corporations, and others. This has led some commentators to suggest as has Julius Stone that "expansion" of international law is proceeding at the price of the "continuous dilution of its content as it is reinterpreted for the benefit of the newcomers". ("Quest for Survival: The Role of Law and Foreign Policy".) The age old choice between heritage and heresy.

In the international law sense, use of legal norms to accelerate development has greatest potential in the field of transfer of technology, whether through sale, international business transactions, transfer of patent rights, trademarks and technical know-how, or as part of foreign aid and foreign investment programs. This need has been recognized and stressed repeatedly by the United Nations General Assembly, by ECOSOC, UNCTAD, UNIDO and numerous other specialized agencies and governmental and non-governmental organizations.

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Data on transfer of technology to developing countries is scanty. It has been neither comprehensively collated nor analyzed in any depth. With respect to the development of new technologies, the level of knowledge of the international system and the experience of developing countries is minimal. Local expertise, much more often than not, is non-existent. Basic infrastructure is often lacking. Financial resources allocated to this purpose are inadequate. Development plans do not fix priorities for the acquisition of certain basic technologies that can accelerate the process of development. The major policy objectives in the developing countries tend to disregard the necessity of developing indigenous technological capacity and attendant services. The ultimate costs or consequences of the importation of such technology are not properly assessed.

These countries also face international markets of technology heavily protected by systems of patents, trademarks, commercial and trade secrets. Access to such technology is generally possible only through licensing agreements. It is an area where developing countries are most vulnerable.

The prospective licensee in the developing country is usually unaware of the complexities of drafting and negotiating a technology licensing agreement. Through inexperience, he may commit himself to an unreasonably long period of dependence on the licensor

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for back-up material, expertise and services. Other restrictive provisions may prevent the absorption of technology and its adaptation to local conditions. Provisions on local training for developing indigenous technological capacity may be totally missing. Hence, technology transfer agreements may work to the serious disadvantage of the recipient in the developing country.

Legal regulatory mechanisms in this regard are imperative. They should exist at two levels - national and international. The former is within the exclusive legislative and policy competence of the national state; the latter is within the competence of some internationally regulated agency or agencies, prescribing binding principles for transfer of technology that do not exploit the vulnerable position of the developing nations or impoverish their resources through one-sided agreements. One weakness of the international legal system is that there are no such binding obligations nor institutions specifically charged with this function.

This whole issue of technology is an issue which is very much in the forefront in 1978, and indeed, the issues surrounding its use in development will be the subject of a major U.N. conference next summer. One of the compelling features of the dialogue on technology transfer turns on the perception of the Paris Convention

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for the Protection of Intellectual Property: foundation of the world patent system. Leading thinkers from the developing world are now focussing more and more on the patent system, and their opposition to the high degree of control of patentable technology exercised by developed countries is vocal and highly articulate.

Their complaints have led to the development of positions which are substantially in opposition to the patent system, particularly in Latin America, where a growing number of countries are enacting legislation which, in spirit and substance, stands in opposition to the existing system.

I have to say that I am not in agreement with the developing country opposition to the system. I understand the reasons for the opposition, but I believe that the developing countries can marshall their ingenuity and their resources to make the system work in their favour. For this reason, IDRC has developed an aggressive and perhaps controversial position of protecting patentable technology, both in the interests of developing countries and of the public sector of developed countries. We have never accepted the premise that public sector corporations or agencies should be any less aggressive in protecting and exploiting technology than are the multi-nationals.

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In a related area, there is little doubt that the many and complex issues of computer technology and the use of computers for the benefit of developing countries are of increasing importance. In this context, we can all proceed as partners, for there appears to be no more assurance in the developed world than in the developing as to how a lawyer safeguards computer software packages. Yet, the transmission of software packages to computer installations in developing countries may become one of the most compelling factors in the process of development in this century. It is one in which IDRC is deeply engaged.

I am suggesting that in the development process there exists a number of areas in which benefit clearly dictates the formulation of techniques which will encourage the developing countries to employ existing legal mechanisms for their advantage, rather than to pursue for years counter systems and mechanisms which offer no guarantee of acceptance by countries on either side of the development divide.

Law can contribute much, then, to the cause of development. It can do so in both the national and the international sense. Needed in both is a judicious blend of innovative attitude and respect for well-proven traditions. That will permit us to work in the context of the present and, in so doing, ensure that heresies, when introduced, will not be fashioned without some linkage to the richness of our heritage.

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The result will be a contribution to human dignity in its broadest sense.